Journal of Collective Bargaining in the Academy

Volume 0 *NCSCBHEP Proceedings 2007* Article 41

April 2007

Annual Legal Update

Rachel Levinson Esq.
American Association of University Professors

Annual Legal Update

34th Annual National Conference

Rachel B. Levinson

Associate Counsel

American Association of University Professors (AAUP)

National Center for the Study of Collective Bargaining

in Higher Education and the Professions

Hunter College, the City University of New York

Tuesday, April 17, 2007

1:30 p.m. – 3:15 p.m.

This outline will cover major legal developments in higher education over the past several years that may be of interest to faculty members and administrators, particularly in the areas of: (1) free speech and academic freedom; (2) employment issues in a variety of contexts; (3) intellectual property; (4) important pending Supreme Court cases; and (5) various legislative developments.

I. Freedom of Speech and Academic Freedom

A. Garcetti v. Ceballos and its Progeny

In May 2006, the U.S. Supreme Court struck a blow to public employees' freedom of speech when it held in Garcetti v. Ceballos, described in more detail below, that when public employees make statements that are "pursuant to their official duties," their employers can discipline them even if their speech also deals with matters that are of concern to the public at large. This represents a fairly significant departure from the Court's previous approach to public employee speech, which had required that courts balance the importance of the speech against the employer's interest in workplace efficiency, and only if the employer's interest outweighed the employee's interests in speaking did the employer prevail. The Court explicitly recognized that imposing similar restrictions on faculty member's speech could raise additional concerns, and it therefore carved out a potential exception for academic scholarship and classroom instruction. The few cases that have been decided do not add much clarity to the debate.

1. Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)

This case involved a California deputy district attorney, Richard Ceballos, who suspected that a deputy sheriff had included false statements in a search warrant affidavit. Ceballos told his supervisors and the defense attorney in the case about his suspicions, and he claimed that he was demoted and transferred in retaliation for speaking out on a matter of public concern. He sued his supervisors, including Gil Garcetti. A lower court dismissed the claim, ruling that Ceballos' speech was not protected by the First Amendment because it occurred in a memorandum to his supervisors as part of his job. An appeals court overturned that ruling and found that Ceballos' speech was protected.

The AAUP filed an amicus brief in the plaintiffs' appeal to the U.S. Supreme Court, and on May 30, 2006, the Supreme Court overturned the appeals court's holding in a 5-4 decision. The opinion held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline," regardless of whether the speech implicates matters of public concern. The Court rejected the notion that the First Amendment requires the Court to balance the competing interests of a government employee and employer when the employee is "performing his or her job duties," concluding that under those circumstances, the government's interest in efficiency automatically outweighs the employee's interest in free speech. Because Ceballos made his statements as part of his official duties as a deputy district attorney, the Court held that the statements did not constitute protected speech, and Ceballos' demotion and transfer therefore did not violate the law.

Fortunately, the Court recognized the concerns raised by the AAUP that such an approach to public employee speech could be read as an impingement on academic freedom. Responding to Justice Souter's dissent, in which he commented that "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties,'" Justice Kennedy 's majority opinion observed that "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." He therefore concluded that

"we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

2. Mayer v. Monroe County Community School Corporation, 2007 U.S. App. LEXIS 1469 (7th Cir. Jan. 24, 2007)

Although this case takes place in an elementary school rather than in an institution of higher education, it helps illustrate how some courts might approach higher education cases under Garcetti.

Deborah Mayer was a probationary elementary school teacher in Monroe County, Indiana. One of her students asked her if she participated in political demonstrations, and she replied that she honked her horn in support of a peace demonstration. After some parents complained, the principal told teachers not to take sides in any political controversy and then cancelled Peace Month. Mayer's contract wasn't renewed for a 2nd year, and Mayer sued, claiming that the non-renewal was in retaliation for her answer and was a violation of her First Amendment rights.

The trial court ruled in favor of the school district, concluding, among other things, that "because the uncontroverted facts establish that Ms. Mayer expressed her views to her students at a time and place and as part of her official classroom instruction, she was acting as an "employee," rather than as a "citizen," so that her speech was not constitutionally protected under *Garcetti*.

Assuming for the sake of its decision that Mayer was in fact fired for her speech, the appeals court affirmed the trial court's decision. Noting that it is well-established that primary and secondary school teachers must stick to the prescribed curriculum, including any prescribed viewpoint, the appeals court reasoned, in somewhat alarming language: "This is so in part because the school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." Although post-secondary instruction was entirely irrelevant to its decision in this case, the court then remarked that because college professors are hired to instruct students, the court had no doubt that "employers are entitled to control speech from an instructor to a student on college grounds during working hours."

3. Head v. Bd. of Trustees of California State University, 2007 Cal. App. Unpub. LEXIS 393 (Cal. Ct. App. 2007) (unpub.)

Stephen Head, a student in San Jose State University's teaching credential program alleged that as a result of some comments he made about multiculturalism in a required course, the professor told him he wasn't fit to teach and prohibited him from using "conservative and libertarian sources." The professor also told Head that he was not progressing in his "professional dispositions," including reflectiveness and commitment to fairmindedness and equity. Head received an F in the course and was placed on academic probation. An internal subcommittee rejected Head's grievance,

finding that the professor had given Head grading criteria on the course syllabus, assessments on returned assignments, and extended opportunities to resubmit corrected work. Head then sued a large cast of characters at the university, alleging that his First Amendment and due process rights were violated by the curriculum, his grade, his treatment during the course, and the "professional dispositions" that teaching credential candidates had to demonstrate. He asked that the university change his failing grade to an A or a B, and asked for an injunction against the use of the professional dispositions, against infringement of the constitutionally protected speech of teaching credential students, and against grade discrimination against "White, White-appearing, or male" credential candidates.

The trial court denied Head's petition, and the appeals court upheld the lower court's decision, firmly holding that "the First Amendment broadly protects academic freedom in public colleges and universities." With respect to Head's request that his grade be changed, the appeals court emphasized that academic decisionmaking is not traditionally appropriate for judicial review and that judges should respect a faculty member's professional judgment. On Head's free speech claims, the appeals court indicated that instructors can exercise reasonable control over student expression during class to ensure that students learn the lessons that are being taught. The court further held:

> Public university instructors are not required by the First Amendment to provide class time for students to voice views

> that contradict the material being taught or interfere with instruction or the educational mission. Although the First Amendment may require an instructor to allow students to express opposing views and values to some extent where the instructor invites expression of students' personal opinions and ideas, nothing in the First Amendment prevents an instructor from refocusing classroom discussions and limiting students' expression to effectively teach.

In addition, the court dismissed Head's argument that the professional dispositions unconstitutionally compelled speech by requiring that students commit to a pre-approved set of values like "social justice, equity, and multiculturalism," holding that a public university may adopt "academic standards that must be satisfied by a student seeking a professional teaching credential even where those standards reflect a certain philosophy of education or academic viewpoints with which a student vehemently disagrees." The court concluded by affirming that "institutional assessments of a student's academic performance . . . necessarily involve academic determinations requiring the special expertise of educators."

4. Payne v. University of Arkansas Fort Smith, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006)

Diana Payne was a tenured professor at the University of Arkansas for nineteen years, until she was fired in 2005. Although a number of issues were raised in connection with her employment and termination, the most relevant one for our purpose was Payne's contention that she was assigned the rank of Instructor, rather than the higher rank of Assistant Professor, in retaliation for her criticism of a university policy. Specifically, Payne sent Sandi Sanders, the university's senior vice chancellor and chief of staff, an email regarding the university's new policy increasing the minimum number of hours that faculty members were expected to be on campus. Payne expressed her belief that she did not in fact have to be physically present on campus, and told Sanders that she thought the policy would affect donations to the university and was "a huge disservice to the community." The court determined that even though the email invoked community concerns, the "crux" of it was Payne's "dissatisfaction with an internal employment policy and not an issue of public concern." The court therefore concluded that under Garcetti, the email was not protected speech under the First Amendment, and dismissed Payne's claim of retaliation.[1]

B. Schrier v. University of Colorado, 427 F.3d 1253 (10th Cir. 2005)

[1] Payne did prevail on some other elements of her suit, and in September 2006, the court awarded her $161,803.40 in compensatory damages and lost wages and benefits, and awarded her attorney around $86,000 in fees and costs. The court also reinstated Payne to her previous teaching position, with the salary and benefits she would have had if she hadn't been discharged, and ordered the university to remove from its website a report on a finding of plagiarism against Payne and to expunge all documents relating to her termination from her personnel file. The order does not provide any details on the reasoning underlying the court's ruling. Payne v. University of Arkansas Fort Smith, 2006 U.S. Dist. LEXIS 64798 (W.D. Ark. Sept. 8, 2006).

Although this case was decided before the U.S. Supreme Court issued its opinion in Garcetti, it shows how one court distinguishes between "academic speech" and speech on other university-related matters.

Dr. Robert Schrier was a tenured faculty member at the University of Colorado School of Medicine, and chair of the department of medicine for over 20 years; in October 2002, the administration stripped him of his chairmanship, though he continued to serve as a tenured faculty member and continued to receive the same salary. Dr. Schrier had objected to a plan to move the medical school campus on the grounds that the move would have negative fiscal consequences and that it would disrupt integrated programs within the school of medicine. Dr. Schrier went to court seeking reinstatement as chair, arguing that the university violated his First Amendment rights, his right to academic freedom, and his due process rights. The federal trial court rejected Dr. Schrier's legal claims, concluding that he had no individual right to academic freedom. Dr. Schrier appealed the ruling to the Tenth Circuit Court of Appeals, and the AAUP filed an amicus brief arguing that a distinctive First Amendment right to academic freedom exists.

On November 1, 2005, the Tenth Circuit upheld the lower court's decision denying Schrier's request for an injunction. The appeals court acknowledged that because Schrier's speech related to the expenditure of public funds and the potential impact a relocation would have on patient care, it was on a matter of public concern. The court also recognized that academic freedom is a "special concern" of the First Amendment. The court appeared to distinguish, however, between "academic speech"

and speech outside the classroom, and after determining that Schrier's speech had disrupted the operations of the medical school and the university, the appeals court concluded that the administration's interest in suppressing Schrier's speech outweighed Schrier's right to free expression.

II. Tenure

Although there have been fewer decisions in the tenure context than in the arenas of free speech or other employment-related matters, a couple of recent cases illustrate two divergent approaches to protection of tenure rights.

A. Saxe v. Bd of Trustees of Metropolitan State College of Denver, 2007 Colo. App. LEXIS 395 (Colo. App. Ct. Mar. 8, 2007)

This case arose from actions taken in 2003 by the college's board of trustees in unilaterally adopting a new faculty handbook. Five tenured faculty members and the Colorado Federation of Teachers sued, seeking a judicial declaration that the new handbook provisions "establish conditions under which employment of tenured faculty members can be terminated or their compensation reduced," thus eviscerating the meaning of tenure in the academic community. In May 2005, the state trial court ruled that the administration had not breached the tenure protections afforded by the faculty handbook, and the plaintiffs appealed. In an amicus brief to the appeals court, the AAUP made two arguments: (1) that the changes in the faculty handbook eliminated the rights that the previous handbook had afforded tenured professors during a reduction-in-force—

specifically, retention priority in case of layoffs and the right to be relocated elsewhere in the institution if at all possible; and (2) that the new provisions governing retrenchment failed to afford due process to affected faculty members. The amicus brief is available in the Legal section of the AAUP Web site.

In a March 2007 decision, the Colorado Court of Appeals reversed most of the trial court's decision. The appeals court first held that the burden of proving whether a faculty member's dismissal was proper must rest with the president, not the faculty member. Invoking points made in the AAUP's amicus brief, the appeals court sent the case back to the trial court for reconsideration on a number of issues, and directed the trial court to determine whether the priority and relocation provisions of the older handbook were vested rights (in which case their elimination by the board of trustees was improper) and to balance two potentially competing public interests: the right to academic freedom and the need for flexible staffing decisions.

On the due process issues, the appeals court agreed with the tenured professors that they could bring due process claims even though none of them had yet been subject to employment decisions based on the new handbook, holding: "Here, Professors already work under the employment contract. They entered into the contract in reliance upon the terms stated in the contract and face substantial uncertainty as to the terms of the contract." The appeals court agreed with the professors that the provision in the 2003 handbook giving the president final authority to dismiss a tenured faculty member was a violation of the professors' right to procedural due process, because the president could both initiate and resolve a dismissal with no right to an appeal of the final decision.

Finally, the court ordered that for a dismissal hearing to accord with due process, the hearing officer must "issue a decision stating, at a minimum, the reasons for that decision and the evidence relied upon."

B. Payne v. University of Arkansas Fort Smith, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006)

In Payne, described in section 4 above, in addition to the free speech issues, the court considered Payne's claim that the decision to terminate her employment violated her substantive due process rights because it was, in her words, "arbitrary and capricious," "without a rational basis," and "made in bad faith." Without explaining its reasoning, the court held that "Plaintiff's tenured employment, while a property interest, is not so 'fundamental' as to be protected by substantive due process." Because substantive due process is different from procedural process, the court's holding here would not necessarily affect a claim that a denial of tenure was *procedurally* faulty – for instance, an allegation that the professor wasn't given access to tenure review materials or to an appeals panel.

III. Employment, Discrimination, and Retaliation

There were also a number of interesting employment-related court cases in the past two years or so. Although the outcome of employment cases tends to depend on the case's particular facts, these cases can nevertheless be instructive. For instance, the U.S. Supreme Court decided that more people can sue for retaliation, and that more types of

behavior might be classified as retaliatory. On the other hand, a court recently decided that employees of religious institutions have almost no protection against employment discrimination, even if they were fired for reasons that do not relate directly to their religious status.

A. Federal cases

1. Burlington Northern & Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006)

Although this case does not involve faculty members or higher education, it will be important to faculty because the Supreme Court takes a new approach in it to retaliation under Title VII, which is the federal law that prohibits discrimination in employment. Employers may now be held responsible for retaliatory actions that once would not have made them liable under Title VII.

Sheila White, an employee with Burlington Northern railroad company, said that she had experienced discrimination and retaliation on the basis of her gender in her job as a forklift operator. White filed a lawsuit against Burlington Northern; a jury agreed that she had been retaliated against and gave her monetary compensation, which was upheld by the appeals court. The Supreme Court agreed to review the case to resolve two issues: (1) whether an action must be employment- or workplace-related to constitute retaliation, and (2) how harmful an action must be to rise to the level of retaliation.

Usually, an action must affect the "terms or conditions" of the employee's employment for a court to decide that the employer has committed employment discrimination. In this case, however, the Supreme Court decided for the first time that an action does *not* need to relate to the terms or conditions of employment to be retaliatory: "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." The Supreme Court also decided that an employee who claims that she was retaliated against must show that a "reasonable employee" would have also found the retaliatory action to be "materially adverse" – that is, that the action might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

Whether an employee can sue his or her employer for retaliation, therefore, depends on the context; as the Court explained, "a schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." Although the Court also said that "petty slights" and "minor annoyances" will not rise to the level of actionable retaliation, this means that courts will be required to decide whether a reasonable worker in *that particular employee's circumstances* would have been dissuaded from filing a lawsuit because of the retaliatory actions.

2. Smith v. City of Jackson, 544 U.S. 228 (2005)

This case dealt with the Age Discrimination in Employment Act (ADEA), which prohibits discrimination against workers who are 40 years old or older. The City of Jackson, Mississippi, implemented a pay raise plan for employees in the Police and Fire Departments, which gave employees who had been with the departments for fewer than five years proportionately larger pay raises than those who had been with the departments for more than five years. Although the plan's language did not explicitly discriminate against workers over forty, it had the effect of treating those workers differently since their pay raises were lower. A group of city employees who were over 40 years old sued the city, arguing that the policy both discriminated against them intentionally and had the effect of discriminating against them, even if it was unintentional. The trial court and appeals court ruled for the city on both claims.

In March 2005, the Supreme Court decided that the ADEA allows employees to sue their employer if a workplace policy ends up treating older workers differently, even if it does not appear to have been created for that purpose. If the employer bases its policy on "reasonable factors other than age" (for example, rank or seniority), however, the policy will probably survive the challenge. This means, for instance, that while older faculty members might be able to sue an administration for instituting a policy that rewards faculty members who attained their terminal degree within a certain number of years before being hired, the older faculty members are unlikely to win if the administration can show that the policy is based on any reasonable factors besides age.

3. Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005)

Roderick Jackson was a high school basketball coach who protested the fact that his all-girl team was being denied equal funding and access to sports facilities and equipment; after he was fired, he filed suit against the city board of education, arguing that he was fired in retaliation for his complaints, and that the termination therefore violated Title IX of the Education Amendments, which prohibits discrimination on the basis of gender in federally assisted education programs and activities. The Supreme Court reviewed the case to decide whether a person who was not himself discriminated against on the basis of gender can nonetheless claim that he suffered retaliation for protesting discriminatory actions against someone else. Although the case arose in the context of high school coaching, this case is important to higher education because all educators, who play an essential role in enforcing Title IX, should be protected from retaliation when they seek to correct violations of the law.

On March 29, 2005, the U.S. Supreme Court decided that Title IX allows people to sue for retaliation even if they would not be able to sue for discrimination. The Supreme Court reasoned that if a teacher cannot sue for retaliation, "the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied." The Court emphasized that "teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."

The decision is available at http://supct.law.cornell.edu/supct/html/02-1672.ZS.html.

4. Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006)

Lynette Petruska, a chaplain at Gannon University in Erie, Pennsylvania, was essentially restructured out of her position for, she alleged, being a woman and protesting sexual harassment at the university. She sued the Roman Catholic university for employment discrimination, retaliation, and breach of contract. The Third Circuit Court of Appeals ultimately endorsed the university's actions on the basis of the "ministerial exception" to Title VII, an exception to traditional anti-discrimination law which permits religious institutions to discriminate on the basis of religion. The Third Circuit ruled that prohibiting a religious institution's employment decision – even a decision that was made on the basis of an employee's race, sex, or national origin – would violate the First Amendment. Religious colleges and universities are therefore shielded from "any claim, the resolution of which would limit a religious institution's right to choose who will perform particular spiritual functions." In this case, even though the decision to fire Petruska may have been based on her gender rather than her religion, the court reasoned that because the university chaplain served a spiritual function, the university's decisions about who should serve as chaplain "were decisions about who would perform th[at] constitutionally protected spiritual function[]."

5. Zelnik v. Fashion Institute of Technology, 464 F.3d 217 (2d Cir. 2006)

Martin Zelnik had been a professor at the Fashion Institute of Technology (FIT), a public institution, for thirty years, and had occasionally taught classes as an adjunct professor post-retirement. Shortly before he retired, Zelnik began vigorously protesting a campus construction plan by FIT that included plans to create a traffic "turnaround" near property that Zelnik owned near FIT's buildings. In addition, after he retired, Zelnik was nominated for "emeritus status" at FIT, which the FIT administration had discretion to grant or not, and which FIT had conferred only once in the previous decade. FIT's president declined to give Zelnik emeritus status, saying:

> Professor Zelnik . . . has falsely impugned the College's motives, intentions, and reputation in a very public way, and has joined the chorus of accusers charging the [C]ollege with irresponsible behavior and of deliberately endangering the welfare of the elderly, the young, and the infirm in order to selfishly take real estate away from the community in pursuit of an "elitist" agenda. . . .
>
> Thus, even if Professor Zelnik had met the threshold requirements for consideration . . . I could not in good conscience recommend that the College honor Professor Zelnik at this time. There is nothing that would require the object of Professor Zelnik's slanderous statements -- our College -- to pay honor to the individual maligning it, and I would not recommend that it do so.

Zelnik sued, arguing that he had been retaliated against by FIT for exercising his First Amendment right to free speech. The trial court dismissed Zelnik's complaint, and the court of appeals upheld the trial court's decision. The appeals court concluded that the denial of emeritus status would not have deterred a "person of ordinary firmness" from exercising his free speech rights under these facts, in large part because the advantages of emeritus status, which did not include any extra salary or other tangible benefits, "carry little or no value and their deprivation therefore may be classified as de minimis." The court also focused on the fact that the criteria for becoming a professor emeritus were "vague, imprecise, and highly discretionary. The uncertainty of having the title of emeritus status conferred further undermines the potential value of such status."

Under different circumstances – for instance, if emeritus status at a particular institution were less discretionary and did confer a specific benefit – a court might decide that denial of emeritus status (or something similar) in response to speech by a public employee constitutes retaliation. Indeed, as the court itself acknowledged, "we do not determine that denial of emeritus status could never support a finding of First Amendment retaliation."

6. Zhao v. SUNY, 2007 U.S. Dist. LEXIS 1568 (E.D.N.Y. Jan. 8, 2007)

Dr. Jin Zhao, a woman of Chinese national origin, was a post-doctoral associate for approximately ten months in a scientific research lab run by a Dr. Batuman at the State University of New York (SUNY). During Dr. Batuman's initial interview of Dr. Zhao, Dr. Batuman allegedly made statements like, "I know Chinese students work very hard, long, so I like to employ Chinese," and "the people who really produce results are these Chinese people." Although Dr. Zhao's hiring letter from Dr. Batuman stated that the position would be for "at least two and at most three years," Dr. Zhao also signed a form with SUNY stating that her employment was at-will. When she subsequently received a letter reiterating that she could be terminated at any time with or without cause, Dr. Zhao, who had received another job offer, complained to Dr. Batuman; Dr. Batuman then assured Dr. Zhao in writing that "Regarding the job security as I told you before we have funding for you for two years for sure. . . . As long as my laboratory is here at SUNY you have a position in it." Dr. Batuman ultimately terminated Dr. Zhao, and Dr. Zhao sued SUNY, SUNY's medical center and research foundation, and Dr. Batuman for, among other things, employment discrimination against her on the basis of her national origin, creation of a hostile work environment, and breach of contract.

Although we do not yet know what the final outcome will be in the case, the trial court refused to dismiss Dr. Zhao's immediately, as the university had requested. First, the court agreed that Dr. Zhao's termination could have been based on ethnic discrimination, based on Dr. Batuman's statements during the interview and Dr. Batuman's subsequent treatment of Dr. Zhao in the lab – for instance, shouting at Dr. Zhao when she went to use the restroom, making fun of her accent, prohibiting her from

using the library, and asking why Dr. Zhao didn't sleep in the laboratory, as one of her reference letters said she used to do. The court observed that it did not matter "that the stereotyping involved positive attributes that could have initially favored a plaintiff at the time of hiring. If an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day."

Similarly, the court agreed that all of Dr. Batuman's actions taken together, including those that were not discriminatory on their face (such as prohibiting Dr. Zhao from using the restroom) could have created a hostile environment for Dr. Zhao, even if none of the actions in isolation would have done so. The court reasoned: "Although it is not the only inference that can be drawn from these facts, these facially neutral incidents could be consistent with an employer who is punishing an employee for not achieving a standard of performance that has been improperly inflated due to impermissible ethnic stereotyping."

Finally, the court agreed that Dr. Batuman's letter assuring Dr. Zhao that she would continue to be employed at the lab limited the at-will employment relationship that had been created in some of the other documents. The court pointed to, among other things, Dr. Zhao's assertion that she turned down another job offer because of Dr. Batuman's letter, and the fact that Dr. Batuman appeared to have authority to act on

behalf of SUNY because she had coordinated all of the details surrounding Dr. Zhao's hiring.

7. Appel v. Spiridon, U.S. Dist. LEXIS 87356 (D. Conn. Dec. 1, 2006)

After Rosalie Appel, a tenured professor of art at Western Connecticut State University (WCSU), cooperated in the investigation of a colleague's claim of race discrimination, the university's full-time art faculty signed a petition describing Appel's behavior as "unprofessional," "disruptive," and "accusatory." A Special Assessment Committee (SAC) reviewed Appel's behavior and recommended that she be given an "in-depth psychological assessment" before the next academic semester. Appel refused to undergo the assessment, and filed suit against four university administrators, alleging that the administrators' conduct violated the First Amendment and the Equal Protection Clause of the Constitution. The administration notified her that she would be suspended without pay or benefits and banned from teaching if she declined to undergo the assessment; before the suspension took effect, Appel asked the court to prevent WCSU from requiring her to undergo the assessment.

The court noted that no other WCSU faculty member had ever been ordered to undergo a psychiatric exam in order to keep teaching and receiving pay and benefits. The court also determined that Appel may have been treated differently from other professors, and that she was not given a chance to change her behavior before being required to

undergo an evaluation. As the court observed, "she is currently barred from teaching, has no access to University services, and is receiving no wages or benefits, including health insurance. The University has other options available to address its issues with Appel's unprofessional conduct, short of requiring a psychiatric examination." The court therefore prohibited WCSU from requiring Appel to undergo a psychiatric exam in order to maintain her salary, benefits, or teaching position.

8. Spector v. Board of Trustees of Community-Technical Colleges, 463 F.Supp.2d 234 (D. Conn. 2006)

James Crowley was a marketing professor at Naugatuck Valley Community College (NVCC) in Connecticut; Dennis Spector, also a professor, was Crowley's supervisor. Approximately seventeen years after he began teaching at NVCC, Crowley was ordained as a Catholic priest and also became the coordinator of the marketing department at NVCC. Soon after he was ordained as a priest, the director of NVCC's Business Division began issuing negative evaluations of Crowley, although both Spector and Crowley's students gave him extremely positive evaluations. After Crowley complained about his treatment to NVCC's president, the president denied Crowley's promotion from Associate Professor to Professor, a promotion for which Spector advocated. Crowley subsequently filed a complaint of illegal discrimination with the Connecticut Commission on Human Rights and Opportunities (CCHRO); shortly afterwards, although Crowley's performance had not changed, the Business Division director gave him a significantly more positive recommendation, and Crowley was

promoted to the position of Professor. Soon after Crowley filed his complaint with the CCHRO, Spector was stopped and harassed by officers with NVCC's Public Safety Department. Spector ultimately filed a complaint with the CCHRO as well, arguing that he had been retaliated against because of his support for Crowley's complaint and his challenges to the discrimination against Crowley. Both Spector and Crowley eventually sued NVCC. The court agreed that the traffic stop and harassment of Spector were severe enough that a jury could decide that the college had created a hostile work environment and retaliated against him for supporting Crowley. The court therefore allowed both Spector and Crowley to continue with their claims.

B. State cases

1. National Pride at Work v. Granholm, 2007 Mich. App. LEXIS 240 (Mich. App. Ct. Feb. 1, 2007)

In November 2004 Michigan voters approved an amendment to the Michigan Constitution stating that "one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." The Michigan Attorney General subsequently issued an opinion holding that the amendment prevents public employers, including public colleges and universities, from providing domestic partner benefits to their employees' domestic partners and children. National Pride at Work (NPW), a non-profit organization working with the ACLU, filed a lawsuit against the state, asking the court to declare the Attorney General's interpretation incorrect. Because Michigan's governor, Jennifer Granholm, sided with the plaintiffs, the governor

and the state's Attorney General ended up on opposite sides of the dispute. After the state trial court ruled that public employers were permitted to provide domestic partner benefits, the state Attorney General appealed the case to the Michigan Court of Appeals.

The state appeals court overturned the trial court's decision, concluding that the language of the amendment to the state constitution "plainly precludes" giving benefits to state employees "if the benefits are conditioned on or provided because of an *agreement recognized as a marriage or similar union*." The court noted that most of the employment agreements, including those of the two state universities, would not award benefits to employees' partners unless the partners had entered into a formal domestic partnership agreement. The court reasoned that this requirement "'recognizes' the validity of a same-sex union as reflected in the '[domestic partnership] agreement' for the 'purpose' of providing the same benefits to a same-sex couple that would be provided to a married couple. This violates the plain language of the amendment prohibiting such unions to be 'recognized . . . for any purpose.'" The court also ruled that the marriage amendment did not violate the principle of equal protection, because both unmarried same-sex couples and unmarried heterosexual couples are prohibited from obtaining employment benefits. Because the plaintiffs plan to appeal the decision to the Michigan Supreme Court, there may be another decision on this matter.

2. Shoucair v. Brown University, 2007 R.I. LEXIS 31 (R.I. Sup. Ct. Mar. 9, 2007)

Soon after Fred Shoucair was hired by Brown University as an assistant electrical sciences professor in Brown's engineering department, Shoucair ended up in a grading dispute with Harvey Silverman, another electrical sciences professor; when Shoucair came up for tenure, Silverman, by then the Dean of Engineering, recused himself but appointed his close friend Maurice Glicksman to convene Shoucair's Tenure Review Committee (TRC). At around the same time, Glicksman asked Shoucair to interview a job candidate; because Shoucair believed the candidate was being brought in solely for affirmative action reasons, however, and believed that the position had already been offered to someone else, Shoucair refused. Soon after, the TRC recommended Shoucair for tenure "with[out] enthusiasm," because Shoucair was "not contributing at the level we would like to see, to the visibility of our research program . . . and to the support of our graduate students and programs."

The electrical sciences group voted to deny Shoucair tenure, and Glicksman informed the tenured engineering faculty that Shoucair's record was lacking in distinction or the promise of "future positive contributions." The tenured engineering faculty and the Committee on Faculty Reappointment and Tenure (ConFRaT) both voted against Shoucair's tenure, and Shoucair filed a grievance with the Faculty Executive Committee (FEC), focusing on Silverman's alleged bias and his attendance at the electrical sciences group's tenure vote meeting (although Silverman abstained from the tenure vote itself). Shoucair also criticized Glicksman's "reckless dissemination" of the group's "tainted vote." At the grievance hearing, Shoucair also argued that Glicksman had retaliated

against Shoucair because of the interview incident. The FEC committee ruled against Shoucair on all of his claims, and Shoucair's appeal to Brown's president failed.

Shoucair sued Brown, asserting, among other things, that Glicksman had retaliated against Shoucair for Shoucair's opposition to what he believed were Glicksman's discriminatory interviewing practices. A jury awarded Shoucair $675,000 in back pay, compensatory damages, and punitive damages, and the Rhode Island Supreme Court upheld the verdict and the trial judge's additional conclusions. The court reasoned that because Shoucair had provided references from "respected authorities in his field" and the TRC recommended tenure, a "reasonable person could surmise from this information that Shoucair merited tenure." The supreme court suggested that Glicksman's animus, including his sharp turnaround on his tenure recommendation immediately after the interview incident, "infected the process" and made the tenure denial a "fait accompli." The court also thought it important that the tenured faculty had never before rejected a recommendation of the TRC, suggesting that the group's vote had "sealed [Shoucair's] fate." The appeals court rejected the university's argument that the provost was the final decision-maker, who didn't know anything about Shoucair's activity or have any animosity towards Shoucair: "a jury may reasonably conclude that even a preliminary evaluation, if based on retaliation or discrimination, influenced the decision-making process and thereby infected the final decision."[2]

[2] The court did vacate the award of punitive damages, holding that the university itself did not "discriminate against Shoucair in the face of a perceived risk that its actions were illegal under [the Fair Employment Practices Act]." In addition, the appeals court upheld the trial court's decision to reduce Shoucair's back-pay award by 30%, because Shoucair abandoned his "systematic search" for academic positions three years after leaving Brown and did not pursue non-academic opportunities. Newspaper articles about the court's decision estimate that when interest is taken into account, Shoucair stands to receive a total of $1.3M.

The AAUP generally focuses on whether the tenure process has protected the faculty member's right to due process and whether the institution has followed AAUP and institutional policies. Generally, courts give deference to academic judgments on tenure, preferring not to interfere in sound academic judgments made by tenure committees on valid criteria. As this case illustrates, however, where a negative recommendation early in the process, made for a potentially inappropriate reason, appears to taint the entire tenure review, a tenure decision may be overturned.

IV. Intellectual Property

A. Bosch v. Ball-Kell, Case No. 03-1408 (C.D. Ill. Aug. 31, 2006)

This ongoing litigation arose out of Barbara Bosch's resignation from her positions as associate professor and course director in the pathology department at the University of Illinois College of Medicine. After she resigned as course director, her syllabi and other teaching materials were removed from her office in a scheme apparently orchestrated by the new course director and the acting chair of the department. Shortly before she resigned, Bosch registered several works, including exam questions and syllabi, with the U.S. Copyright office; in addition, she had also already sent course materials to the printer to be compiled for the course syllabus. When the new course director was assigned to teach the course that Bosch had originally been assigned to teach, she used the course materials that had been sent to the printer, which included

items that Bosch had registered with the copyright office, as well as exam questions from the department database, which also included questions Bosch had registered. Bosch sued the new course director and acting department chair, alleging that, among other things, her copyright rights had been violated. The defendants argued that the various course materials were "work for hire" and therefore belonged to the university rather than to Bosch herself.

Federal copyright laws define "work for hire" as "a work prepared by an employee within the scope of his or her employment," and give ownership of such works to the employer. 17 U.S.C. §§ 101 & 201(b). Although such language might seem to encompass a professor's course materials, the court reviewing Bosch's case noted that the academic setting raises different considerations from the usual work-for-hire scenario, and that courts must look at a university's policies rather than relying solely on the copyright statute's language. The court also recognized that the federal appeals court governing Illinois has recognized a "teacher exception" to the Copyright Act, based on "the havoc that [a contrary] conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception." The court, after reviewing both case law and comments about the university's policy in faculty senate committee meeting notes, therefore refused to rule that Bosch did not have ownership of the teaching materials. The court also rejected the defendants' argument that their use of the teaching materials

was permitted as a "fair use" by copyright laws, concluding that a number of facts were still unresolved.

B. Pittsburg State University/Kansas NEA v. Board of Regents, PSU and PERB, 122 P.3d 336 (Kan. Sup. Ct. 2005)

This case involved a challenge by the Kansas National Education Association (KNEA) to the Kansas Board of Regents' proposed policy giving ownership of faculty intellectual property to the faculty members' universities. In 2004, a Kansas appellate court ruled against the KNEA, stating that the Regents were not required to bargain with the union over copyright ownership issues because such a practice would conflict with a federal provision that an author *may* negotiate away his or her intellectual property rights but cannot be *required* to do so. The appellate judge reached this decision by assuming that the faculty members' intellectual property was work-for-hire, and thus the property of the University.

The KNEA appealed the case to the Kansas Supreme Court, and the AAUP filed an amicus brief arguing that the work-for-hire doctrine does not include faculty intellectual property. On November 10, 2005, the Kansas Supreme Court ruled that intellectual property rights are not simply assumed to be work-for-hire belonging to the university and can be a subject of collective bargaining. Finding the appellate court's reasoning to be an "incorrect application of federal copyright law," the Kansas Supreme Court concluded that to assume universities' blanket ownership of faculty intellectual property was "too big a leap." Instead, the court recognized that the question of

ownership of faculty work is a complex one, depending on a careful analysis of the employment relationship and the reason for and method of creation of the work itself. The court recognized that faculty intellectual property ownership cannot be treated simply as the work of an employee belonging to an employer, but rather "will necessarily involve not just a case-by-case evaluation, but potentially a task-by-task evaluation."

V. Employee e-mail use

A. NLRB: employee use of employer's email

On March 27, 2007, the National Labor Relations Board held a hearing on "whether employees have the right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters."[3] The NLRB planned to focus on a number of related issues, including: possible restrictions on email use for union matters; how much control an employer can assert over a non-employee's use of its email system; the relevance of whether the employee works at home; and whether email use is a mandatory subject of bargaining. When the Board issues its decision, it should be available at www.nlrb.gov.

VI. Pending Supreme Court Cases

[3] See http://www.nlrb.gov/shared_files/Press%20Releases/2006/R-2613.pdf.

A. **Union fees**: Washington v. Washington Education Association, 130 P.3d 352 (Wash. Sup. Ct.), cert. granted sub nom. Davenport v. WEA, 127 S. Ct. 35 (2006)

This case involves a challenge to the agency shop fee process of the Washington Educational Association (WEA), a union in Washington State. The WEA represents about 80,000 educational employees, approximately 1200 of whom are in higher education. About 5% of the WEA's constituents are non-members, who must pay agency shop fees pursuant to state statute. A portion of both members' and nonmembers' dues go to support political causes on behalf of all educational employees that are unrelated to the union's collective bargaining activities. Twice a year, the WEA sends nonmembers a "*Hudson* packet," which informs them of their right to opt out of paying fees for political expenditures that are not related to collective bargaining; if the non-members do not notify WEA that they would like to opt out, then their fees may be used for political expenditures without further notice from WEA.

Several groups sued the WEA, arguing that this process violates a Washington state statute (RCW 42.17.760), which prohibits labor organizations from using non-members' agency shop fees for political purposes "unless affirmatively authorized by the individual." The groups argued that the WEA's opt-in presumption does not constitute "affirmative authorization," while the WEA argued that the statute itself was unconstitutional. The Washington state supreme court agreed with the union, ruling that the statute was unconstitutional under the First Amendment and that the state could not

require the WEA to get affirmative authorization from every non-member to use their dues for political expenditures. The supreme court asserted that this approach "strikes a balance" between the union's and its non-members' free speech rights.

A minority of the supreme court vociferously dissented, arguing that (1) "affirmatively authorize" means what it sounds like, and (2) just because the constitution requires *at least* an opt-out scheme does not mean that an opt-in scheme is constitutionally prohibited, especially because the payroll deduction for union shop fees could be eliminated altogether. The U.S. Supreme Court is expected to issue a decision this spring.

B. **K-12 Affirmative Action**: Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005), cert. granted 126 S.Ct. 2351 (2006); McFarland v. Jefferson County Public Schools, 416 F.3d 513 (6th Cir. 2005), cert. granted sub nom. Meredith v. Jefferson County Bd. of Education, 126 S. Ct. 2351 (2006)

These two cases, being decided jointly, address the issue of whether local school districts can make decisions based on race as a method of ensuring racial diversity, and avoiding segregation, in public schools. In 2000, a parental coalition called Parents Involved in Community Schools sued the Seattle School District, arguing that its policy of allowing all students to apply to attend any district high school, but using race as a tiebreaker when a high school received more applicants than it could accept, violated equal protection principles. A federal court of appeals ultimately held that the school

district had a compelling interest in securing the educational and social benefits of racial and ethnic diversity, and in attempting to end racial segregation in its high schools by ensuring that its assignments did not simply replicate Seattle's segregated housing patterns. It also concluded that the school district's plan was narrowly tailored to achieve its compelling interests.

The U.S. Supreme Court heard this case together with Meredith v. Jefferson County Board Of Education, a similar case from Kentucky, in December 2006. The Court's decision, which it is expected to release in the spring, will likely address the question of whether the University of Michigan affirmative action decisions (Grutter and Gratz) affect the Equal Protection rights of public high school students, as well as whether racial diversity is a compelling interest that can justify the use of race in selecting students for admission.

The AAUP joined an amicus brief to the Court, arguing that diversity is important at all levels of education and that the Court should give the same deference to these educators' decisions as it did to the University of Michigan's decisions. The Bush administration filed briefs on behalf of the parents in both cases.

VII. Legislative Developments

A. Academic Bill of Rights & Intellectual Diversity in Higher Education

In legislatures around the country, elected representatives have been debating David Horowitz's so-called "Academic Bill of Rights" (ABoR).[4] The ABoR sets a series of purported "academic freedom" requirements designed to restore "ideological balance," which Horowitz claims is necessary because "faculty and administration" are "ideologically conformist in their liberalism." Versions of ABoR have been introduced in numerous states and attached to federal spending bills over the last few years. While no such provisions have yet become governing law, some states are holding hearings, others have entered into "Memorandums of Understanding"[5] and still others may have legislation in the near future. In 2006, the Pennsylvania House of Representatives formed a special committee on academic freedom in higher education, which heard from all Pennsylvania higher education institutions and other witnesses from a variety of backgrounds; in November 2006, the committee unanimously rejected ABoR legislation, concluding that violations of students' academic freedom were "rare."[6]

Moreover, similar so-called "Intellectual Diversity" legislation has been introduced in eleven states so far in 2007 (AZ, GA, KY, MA, MO, MT, NY, OR, TX, VA, and WV). Picking up where the ABoR campaign left off, and tracking much of the

[4] See www.studentsforacademicfreedom.org for the language of the ABoR.
[5] For example, the Presidents of many of Colorado's public universities have entered into a memorandum of understanding as a way to forestall legislation. The MOU provides, in part, that: Higher education in Colorado is a prized institution that fosters learning, culture and economic vitality. Colorado's institutions of higher education are committed to valuing and respecting diversity, including respect for diverse political viewpoints. No student should be penalized because of political opinions that differ from a professor's. Every student should be comfortable in the right to listen critically, and challenge a professor's opinions. Policies that protect students' rights should not cast doubt on professors' academic freedom. Academic freedom of faculty and academic freedom of students are essential and complementary elements of successful education. While the State of Colorado has a legitimate oversight role in state-sponsored higher education, the individual institutions and their governing bodies are in the best position to implement policies to respect the rights of students and faculty. Each institution will review its student's rights and campus grievance procedures to ensure that political diversity is explicitly recognized and protected. Each institution will ensure those rights are adequately publicized to students.
[6] See www.aaup.org/AAUP/GR/ABOR/Resources/Saga177.htm.

ABOR's language, so-called intellectual diversity bills address most of the same areas: reiterating that students should be exposed to a wide range of ideas, faculty should be hired and/or granted tenure based solely on expertise, and colleges and universities should report on their efforts to promote political and ideological diversity on campus. The bills have also varied from each other in several ways. For instance, some state legislatures, such as Texas's, have offered resolutions "encouraging" that action be taken at the campus level, while in others – for instance, Georgia – a resolution has preceded an actual introduced bill. In addition, while some bills suggest possible courses of action for an institution to take, such as including intellectual diversity questions on course evaluations or conducting campus surveys, others would require specific action if passed.

Fortunately, most of the intellectual diversity bills are expected to die quietly in committee, but several appear to pose a risk of being passed. The most worrisome bill is Missouri HB 213, which would require "each public institution to report annually to the general assembly detailing the steps the institution is taking to ensure intellectual diversity and the free exchange of ideas."[7] In addition, the Arizona legislature has been considering SB 1542, which would require that a teacher who is "working in an official capacity" cannot "advocate one side of a social, political or cultural issue that is a matter of partisan controversy" or take positions on legislation or candidates. A college professor found to have violated the statute could face penalties including mandatory training or a fine of $500.[8]

[7] See http://www.house.mo.gov/bills071/bills/hb213.htm.
[8] Daniel Scarpinato, "Plan: Stop School Political Bias," Arizona Daily Star, February 10, 2007 (http://www.azstarnet.com/dailystar/168607).

Because the ABoR and the intellectual diversity bills represent an attack on higher education, various faculty members and university administrations have joined forces to try to combat this danger to higher education and academic freedom; for instance, representatives from both constituencies testified before the Pennsylvania legislature's special committee. A number of higher education organizations, including the AAUP, the American Council on Education, and a group of 20 presidents from prestigious research universities from around the world have also spoken out about the threat of the ABoR.[9]

B. Loyalty Oaths

In 1967, the Supreme Court held in Keyishian v. Board of Regents, 385 U.S. 589, that a New York loyalty oath statute was unconstitutionally vague, declaring academic freedom to be a "special concern of the First Amendment" and expressing a conviction that loyalty oaths that attempt to govern a professor's speech threaten to "cast a pall of orthodoxy over the classroom." The Supreme Court's disapproval of loyalty oaths in the academic context has been increasingly disregarded, however, as several states have recently instituted or begun enforcing existing loyalty or other oaths for professors.

The most egregious is the oath currently required of persons contracting with or hired by Ohio state agencies, including public universities. Called the Declaration of Material Assistance/Non-Assistance to a Terrorist Organization, the form, which is part

[9] See, e.g., http://www.aaup.org/statements/SpchState/Statements/joint%20statement%20on%20ABoR.pdf; http://www.campusspeech.org/abor.

of the Ohio Patriot Act, requires correct answers to six questions about support for terrorism. Leaving a question blank operates as an admission of guilt, resulting in a denial of the job or contract and, possibly, a visit from the Ohio Department of Homeland Security. Ohio universities are currently requiring that academic employees hired after April 2006 sign the declaration (though at least one institution is having an internal debate about whether to require graduate and teaching assistants to sign); the ACLU is searching for an adjunct professor who has been denied employment after refusing to sign the declaration, in order to challenge the constitutionality of the oath.

As for more standard loyalty oaths, a theater professor and director in Nevada was fired from his teaching job last year for refusing to sign a loyalty oath.[10] The oath read, in part, "I do solemnly swear that I will support, protect and defend the Constitution and government of the United States, and the Constitution and government of the state of Nevada, against all enemies, and that I will bear true faith, allegiance and loyalty to the same, and that I will well and faithfully perform all the duties of the office of on [sic] which I am about to enter; so help me God; under the pains and penalties of perjury." According to the state's archivist, the oath had been on the books in Nevada since the 1860s; the professor was not asked to sign the oath until 2006, fifteen years after he began teaching at the Community College of Southern Nevada and twenty-eight years after he began directing at the college.

[10] See, e.g., Matt O'Brien, "Good Night and Good Luck," CityLife, March 24, 2006, http://www.lasvegascitylife.com/articles/2006/04/13/local_news/news01.txt and Anthony Del Valle, "THEATER CHAT: Loyalty oath dispute ends director's teaching job at CCSN," Las Vegas Review-Journal, March 26, 2006, http://www.reviewjournal.com/lvrj_home/2006/Mar-24-Fri-2006/weekly/6490528.html. See also http://www.savageminds.org/2005/10/03/party-like-its-1954/.

Similarly, as required by state statute, the University of California system requires all employees to sign a loyalty oath before beginning work for the university (as must all California public employees).[11] The oath reads: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter."

[11] See http://www.ucop.edu/atyourservice/forms_pubs/forms_worksheets/upay585.pdf.